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IN THE

Supreme Court of the United States

October Term, 1965

No. 1087

ROBERT NATHANIEL BROWN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

ROBERT M. ALEXANDER
1829 Columbia Pike
Arlington, Virginia 22204
Attorney for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

ROBERT NATHANIEL BROWN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Nathaniel Brown prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia of December 2, 1965, affirming his conviction for a violation of Section 54-488 of the Code of Virginia, 1950, As Amended, and a sentence of three years imprisonment in the State Penitentiary and a sentence of $1,000.00 fine plus costs imposed by the Circuit Court of the County of Arlington County, Virginia.

OPINIONS BELOW

Petitioner's conviction by the Circuit Court of Arlington County, Virginia on May 14, 1965, of the offense of unlawfully and feloniously possessing and having under his control a narcotic drug, to-wit: Heroin, a derivative of

opium, in violation of Section 54-488 of the Code of Virginia, 1950, As Amended, against the peace and dignity of the Commonwealth of Virginia was affirmed by the Supreme Court of Appeals of Virginia in an Order entered December 2, 1965. Said Orders of Conviction and Affirmation are reprinted in Appendices, *infra*.

JURISDICTION

The Order affirming Petitioner's conviction was entered on December 2, 1965. The jurisdiction of this Court is invoked under 28 United States Code, Annotated, Section 1257 (3).

THE QUESTIONS PRESENTED

1. Where a vehicle is stopped for an alleged traffic violation, is evidence of possession of narcotics obtained from a search of said vehicle by a police officer without a search warrant admissible in a trial on the charge of illegal possession of narcotics?

2. Whether or not a defendant who requests to withdraw a plea of guilty to a charge before imposition of sentence should be allowed to withdraw said guilty plea.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States are set forth in the Appendices, *infra*, page App. 9.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

The Grand Jurors of the Commonwealth of Virginia, in and for the County of Arlington attending the said Court at its December Term, 1964, returned a "true bill" indict-

ing the Petitioner, Robert Nathaniel Brown, on the charge that "on or about the 7th day of December, 1964, (he did) unlawfully and feloniously possess and have under his control a narcotic drug, to-wit: Heroin, a derivative of opium, in violation of Title 54-488 of the Code of Virginia, feloniously and against the peace and dignity of the Commonwealth.

The Petitioner filed a Motion to Suppress the evidence in possession of the Commonwealth of Virginia, namely, allegedly twenty-one (21) capsules of heroin, a derivative of opium. Upon argument of retained counsel, said motion was denied. Exception was duly noted. On March 4, 1965, Petitioner entered a guilty plea to the indictment of possession of heroin. The Trial Court found the Defendant guilty of the charge of the indictment and referred his case to the Probation Officer for investigation and report before imposition of sentence. On May 14, 1965, Petitioner appeared in the Trial Court for imposition of sentence. After reading the probation report which recommended against probation, Petitioner moved the Court to allow him to withdraw his "guilty" plea and enter a plea of "not guilty." This motion was denied and Petitioner was sentenced to three years in the state penitentiary and fined $1,000.00. On or about July 12, 1965, the Trial Court appointed Robert M. Alexander of Arlington County, Virginia as counsel for Petitioner to perfect an appeal to the Virginia Supreme Court of Appeals. Petitioner executed a pauper's affidavit. Petitioner's new counsel filed a motion to suspend execution of sentence, motion to set aside and vacate entry of guilty plea and motion for new trial. The Trial Court, on July 16, 1965, denied the motion to set aside and vacate entry of guilty plea and motion for new trial. To the rulings of the Court, the Petitioner excepted. The Trial Court granted the motion to suspend the exe-

cution of sentence while application was made for a writ of error to the Supreme Court of Appeals of Virginia.

B. The Evidence at Petitioner's Trial

Petitioner was a passenger in the rear of a 1962 Falcon automobile which allegedly failed to stop at a stop sign. Detective Edwin T. Faulconer, Arlington County Police Department, after following said vehicle about one and one-quarter miles stopped it for allegedly running a stop sign. Detective Faulconer ascertained the driver did not have a valid Virginia driver's license. The driver was not charged with failure to stop at a stop sign. Detective Faulconer searched the car and found allegedly 21 capsules of heroin, 2 hypodermic syringes, an eye dropper syringe and one bottle cap hookup. He did not have a search warrant. (Tr. February 28, 1965 pp. 11-20). Petitioner contends the 21 capsules of allegedly heroin were under the floor mat in the rear of the vehicle. (Tr. February 28, 1965, p. 21)

On March 4, 1965, when the Court asked the Petitioner, "Do you want to plead guilty to that charge?", he said, "No." Subsequently, after interrogation, he said, "Yes." (Tr. March 4, 1965 pp. 6-7) However, Defendant said, "Yes, I am confused about the situation."

On May 14, 1965, when the Defendant appeared in Court for the Probation Report and imposition of sentence, among other things, the following took place:

> "THE COURT: You entered a plea of guilty in this case. Somewhere in this record—I thought it was in this letter—there is some indication that—
>
> MR. KILLCARR: On the first page, I believe, Your Honor, about halfway, three-quarters of the way down.

BY THE COURT:

Q Your mother says that your lawyer told you if you pleaded guilty, which you didn't want to do, that you would have a good chance for probation. Did anybody promise you probation in this case?

A No.

Q What?

A No.

Q You say no?

A No.

Q All right. Did you intend to plead guilty? Is that what you want to do or not?

A Well, I hadn't intended to when I came to court; no." (Tr. pp. 4-5, May 14, 1965)

* * *

"THE COURT: Well, I think that if he wants to change his mind, then he ought to get another attorney. . . . Now, are you asking that he be allowed to withdraw his plea of guilty?

MR. TRUEAX: Yes, sir." (Tr. p. 6, May 14, 1965)

REASONS FOR GRANTING THE WRIT

1. The Search Of The Automobile In Which The Petitioner Was A Passenger And The Consequent Seizure Of The Envelope Containing 21 Capsules Of Heroin Was Illegal.

An automobile may be searched and seized without a search warrant where there is reasonable and probable cause to believe that it is being used as a vehicle in illicit traffic, but to constitute such cause there must be more than a mere suspicion. *Robinson* v. *U.S.*, 164 F. 2d 271, *U. S.* v. *Cotter*, 80 F. Supp. 590, *U. S.* v. *Costner*, 153 F. 2d 23. A police officer must have reliable information of transportation of illicit matter to search an automobile

without a search warrant. *Husty* v. *United States,* 282 U. S. 694.

In the instant case, there was no indication visible or otherwise sensible to the arresting officer of the presence of contraband in the automobile in which the Petitioner was a passenger in the rear seat. Furthermore, the arresting officer was not in possession of information or even a warning that Petitioner Brown was transporting or had under his control heroin. Nor was the officer on the lookout for Brown for a known and unpunished violation of law.

Since the Fourth Amendment's right of privacy has been declared enforceable against the State through the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. *Clay* v. *U. S.,* 239 F. 2d 196. All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a State Court. *Mapp* v. *Ohio,* 367 U. S. 643.

Accordingly, the motion to suppress the evidence by the Defendant should have been granted. *United States* v. *Di Re,* 332 U. S. 581, 68 S. Ct. 222, *Rios* v. *United States,* 364 U. S. 256, 80 S. Ct. 1431 (1960).

2. A Defendant Who Requests To Withdraw A Plea Of Guilty To A Charge Before Imposition Of Sentence Should Be Allowed To Withdraw Said Guilty Plea.

The Fifth Amendment of the Constitution of the United States, in part, reads no person "shall be compelled in a criminal case to be a witness against himself; . . ." The effect of disallowing a defendant to withdraw a guilty plea before imposition of sentence is tantamount to compelling

the Defendant to testify against himself when he is not disposed to do so.

A plea of guilty is but a confession of guilt in open court and a waiver of trial and, like a confession out of court, it should be scanned with care and received with caution and should not be received unless freely and voluntarily made, and, if accused was induced to enter the plea by fraud or mistake, he should be allowed to withdraw it. *Rowland* v. *State,* 35 SE 2d 372, *United States ex rel. Perpiglia* v. *Rundle,* 221 F. Supp. 1003 (E.D. Pa. 1963).

CONCLUSION

Wherefore, it is respectfully requested that this petition for the writ of certiorari to the Supreme Court of Appeals of Virginia be granted.

ROBERT M. ALEXANDER
1829 Columbia Pike
Arlington, Virginia 22204
Attorney for Petitioner

APPENDIX A

COMMONWEALTH OF VIRGINIA

v. C-4389

ROBERT NATHANIEL BROWN

THE 10th day of February 1965 came the Commonwealth of Virginia, by its Attorney, the Defendant pursuant to his recognizance and his Attorney Alfred W. Trueax.

WHEREUPON the Defendant moved the Court in the motion filed herein, to suppress all the evidence obtained against the Defendant.

THEREUPON the Court continued the case to February 24, 1965 for hearing on the motion to suppress the evidence.

WHEREUPON the Defendant was arraigned and after conferring with his Attorney entered a plea of "Not Guilty" to the charge in the indictment herein.

THEREUPON the Court continued this case to March 4, 1965 for a jury trial.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.
Entered this 12th day of February 1965.

/s/ EMERY N. HOSMER
Judge

A Copy
Teste:
H. BRUCE GREEN, Clerk
/s/ VIRGINIA C. GREEN
Deputy Clerk

APPENDIX B

COMMONWEALTH OF VIRGINIA

v. C-4389

ROBERT NATHANIEL BROWN

THE 24th day of February 1965 came the Commonwealth of Virginia by its Attorney, the Defendant pursuant to his recognizance and his Attorney Alfred W. Trueax.

THEREUPON by agreement of Counsel, the Defendant's motion to suppress the evidence in this case and the case of Commonwealth of Virginia v. David Lee Washington, C-4388 were tried together.

WHEREUPON the Court heard testimony and argument of Counsel on the Defendant's motion to suppress the evidence.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the motion to suppress should be and the same hereby is denied; to which said ruling of the Court the Defendant duly excepted.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 1st day of March 1965.

/s/ WALTER T. McCARTHY
Judge

A Copy
Teste:
H. BRUCE GREEN, Clerk
/s/ VIRGINIA C. GREEN
Deputy Clerk

APPENDIX C

COMMONWEALTH OF VIRGINIA

v. C-4389

ROBERT NATHANIEL BROWN

THE 4th day of March 1965, came the Commonwealth of Virginia, by its Attorney, the Defendant pursuant to his recognizance and his Attorney, Alfred W. Trueax.

WHEREUPON the Defendant after conferring with his Attorney moved the Court for leave to withdraw his plea of "Not Guilty" and enter a plea of "Guilty" to the charge in the indictment herein, which said motion the Court granted and the plea of "Not Guilty" was accordingly withdrawn; the Commonwealth of Virginia consenting to the entry of the plea of "Guilty" to the charge in the indictment herein.

THEREUPON the Defendant after further conference with his Attorney, entered a plea of "Guilty" to the charge in the indictment herein.

WHEREUPON at the request of the Defendant and with the consent of the Court, the Defendant and the Commonwealth of Virginia, the Defendant taking such action after being fully advised by his Attorney, the Court heard the case, including sworn testimony, without the intervention of a jury, all matters of law and fact being presented to the Court for determination.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the Defendant is "Guilty" as charged in the indictment herein and so finds.

THEREUPON the Defendant moved the Court to refer this case to the Probation Officer for the Circuit Court of

Arlington County, Virginia, for investigation and report prior to the imposition of sentence; which said motion the Court granted and accordingly ordered said reference.

IT IS FURTHER ORDERED by the Court that this case be continued to March 26, 1965, at 1:30 P.M. for the filing of the aforesaid report and imposition of sentence.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 4th day of March 1965.

/s/ EMERY N. HOSMER
Judge

A Copy
Teste:
H. BRUCE GREEN, Clerk
/s/ VIRGINIA C. GREEN
Deputy Clerk

APPENDIX D

COMMONWEALTH OF VIRGINIA

v. C-4389

ROBERT NATHANIEL BROWN

THE 14th day of May 1965 came the Commonwealth of Virginia, by its Attorney, the Probation Officer for the Circuit Court of Arlington County, Virginia and the Defendant in custody of the Sheriff and his Attorney, Alfred W. Trueax.

WHEREUPON the Probation Officer aforesaid presented his report herein in open Court in the presence of the accused and the accused was asked by the Court if he could read and upon receiving an affirmative reply, the said report was handed to him for perusal by him and his Attorney.

THEREUPON the Defendant and his Attorney read said report and returned same to the Court, which ordered it filed as a part of the record in this case.

WHEREUPON the Defendant was sworn and testified in open Court.

AND IT BEING DEMANDED of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, he stated to the Court that he wished to withdraw his plea of guilty and to have a jury trial.

THEREUPON the Court took into consideration the request of the accused, the statement of his counsel and the answers of the accused to questions from the Court, and

THE COURT being of the opinion that Defendant's plea was made freely after consulting competent counsel, refused to allow the Defendant to withdraw his plea and

being of the further opinion that the Defendant is guilty doth adjudged and ordered that he is guilty and doth ascertain and fix the punishment of the accused to be confinement in the penitentiary of this Commonwealth for a period of three (3) years and pay a fine of $1000.00 and payment of the costs of this proceeding.

IT IS ACCORDINGLY THE JUDGMENT of this Court that the said ROBERT NATHANIEL BROWN, be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term of three (3) years, and pay a fine of $1000.00, the period by the Court ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said ROBERT NATHANIEL BROWN its costs by it about its prosecution in this behalf expended.

AND IT IS FURTHER ORDERED that as soon as possible after the entry of this order the prisoner be removed and safely conveyed according to law from the jail of this Court to the said penitentiary therein to be kept, confined and treated in the manner provided by law.

THE COURT ORDERS that the prisoner be allowed credit for the time spent in jail awaiting trial, namely, since Dec. 7th, 1964 to Jan. 24th, 1965 and from April 24th, 1965 to May 14th, 1965.

AND the Defendant is hereby remanded to jail.
Entered this 19th day of May 1965.

/s/ WALTER T. MCCARTHY
Judge

A Copy
Teste: H. BRUCE GREEN, Clerk

/s/ VIRGINIA C. GREEN
Deputy Clerk

APPENDIX E

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday *the* 2nd *day of* December, 1965.

The petition of Robert Nathaniel Brown for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Arlington County on the 19th day of May, 1965, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court, which court shall allow court-appointed counsel the sum of one hundred twenty-five dollars for services rendered on this appeal, his costs and necessary expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him in this court, his costs and necessary expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the said circuit court to represent the said Robert Nathaniel Brown therein, his costs and necessary expenses, and the costs to be assessed in this case by the clerk of the said circuit court.

A Copy
Teste:
/s/ H. G. TURNER
Clerk

Commonwealth's costs:
Clerk's fee in Supreme Court of Appeals $1.50

Teste:
/s/ H. G. TURNER, Clerk

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA	)	
Plaintiff	)	
v.	)	Criminal No. C-4389
	)	
ROBERT NATHANIEL BROWN	)	
Defendant	)	

ORDER

This case came on this 20th day of December, 1965, to be heard upon the motion to stay execution of sentence filed on behalf of the Defendant herein and upon argument of counsel and upon consideration whereof it is therefore,

ADJUDGED, ORDERED and DECREED a Stay of Execution of Sentence be and the same is hereby granted to the Defendant, Robert Nathaniel Brown, for a period of sixty days in order for the Defendant to petition the Supreme Court of the United States for a writ of certiorari.

The bond is continued.

Entered: 12/20/65.

/s/ WALTER T. MCCARTHY
Judge

I ASK FOR THIS:

/s/ ROBERT M. ALEXANDER
Robert M. Alexander
Attorney for Defendant

/s/ WILLIAM J. HASSAN
Commonwealth Attorney
Arlington County, Virginia

APPENDIX G

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, support by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."